

ORIGINAL

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the)
Cable Television Consumer)
Protection and Competition)
Act of 1992)
)
Broadcast Signal)
Carriage Issues)

MM Docket No. 92-259

COMMENTS OF
PUERTO RICO CABLE TV ASSOCIATION

The Puerto Rico Cable TV Association (the "Association") hereby files these comments in response to the Notice of Proposed Rulemaking in the above-captioned proceeding ("Notice"). The Notice seeks comment on specific proposals to implement the must-carry and retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").

The Association is made up of cable operators throughout the Commonwealth of Puerto Rico. As the Commission knows, Puerto Rico is an island where Spanish is the predominant language. Thus, virtually all of the licensed television stations in Puerto Rico program mainly in Spanish. This creates unique issues and problems for the Association's member cable systems. These comments speak principally to one such issue, namely, access by

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the cable systems to mainland affiliates of CBS, NBC and ABC provided by satellite to the Commonwealth. The Association also seeks clarification regarding access to the "local" stations licensed to Puerto Rico.

Although there are a number of licensed television broadcast stations in Puerto Rico, there is not a single United States network affiliate on the island.¹ Subscribers to cable systems in Puerto Rico presently have access to three affiliate stations only because the cable systems are able to receive them by satellite via a service named Primetime 24.² Affiliates of CBS, NBC and ABC have been carried by Primetime 24 since 1987. The 1992 Cable Act regulatory scheme for the carriage of satellite-delivered broadcast signals does not contemplate or deal with the situation which Puerto Rico presents. There are, however, actions which the Commission can take in this rulemaking which would ensure that cable subscribers in Puerto Rico continue to have access to affiliates of CBS, NBC and ABC.

New Sections 614 and 325(b) set up a regulatory scheme whereby commercial television stations are given the option of requiring "local" cable systems to either carry them or to require that cable systems obtain retransmission consent from the

¹Channel 18 in San Juan is listed in the Stations Volume of the 1992 Television and Cable Factbook as carrying NBC programming. That, however, is not presently the case.

²The three stations provided via Primetime 24 are WRAL, Raleigh-Durham, NC (CBS), WABC, New York, NY (ABC) and WXIA, Atlanta, GA (NBC). Approximately 260,000 cable homes receive these three stations via Primetime.

broadcaster. The broadcaster must make an election every three years as to which method for obtaining carriage it wishes to follow. The definition of a local station entitled to exercise such an election is premised on the fact that every county in the contiguous United States is located in an Area of Dominant Influence ("ADI")³. Unfortunately, Puerto Rico is not listed in the ADI of any television station. There is, therefore, a statutory gap which the Commission must fill in order to ensure the continued availability of FCC licensed broadcast stations to Puerto Rico.

In the absence of applicable must-carry regulations, a cable system in Puerto Rico has no apparent choice but to refer to new Section 325(b) of the 1992 Cable Act to determine its ability to carry broadcast stations. This section requires that a cable system has to obtain permission from an originating broadcast station in order to continue or initiate carriage of that station.

The retransmission consent requirement also contains a number of exceptions. One exception deals with retransmission by a cable operator of the signal of a "superstation" if that signal was being obtained from a satellite carrier on May 1, 1991. The definition of "superstation" is that contained in Section 119(d) of Title 17, The Satellite Home Viewer Act of 1988. That provision states that a superstation is a television broadcast

³ADIs are the creation of Arbitron, a private broadcast rating service.

station which is secondarily transmitted by a satellite carrier. However, the definition specifically excludes a network station. Thus, based on the literal terms of the applicable statutory provisions, it appears that the three network stations received by satellite in Puerto Rico might not qualify as superstations for the exemption from the retransmission consent requirements of Section 325(b). However, while United States network stations delivered to the mainland are intended to be disqualified from the exemption, this should not be the case when they are delivered by satellite to Puerto Rico.

There is definitive Commission precedent for holding that English-language stations, even if they transmit network programs, can be characterized as other than network affiliates in the context of Puerto Rico. In Cable Television Co. of Puerto Rico, 46 FCC 2d 1096 (1974), the Commission permitted the importation of two English-language television stations, which were alleged to be network affiliates and thus impermissible imported stations under the carriage rules then in effect, on the basis that they were foreign language stations, not network stations, for purposes of cable carriage in Puerto Rico. As the Commission stated:

... we conclude that the same considerations that persuaded us to permit [unlimited] importation of non-English language stations into English-speaking communities compel us to permit importation of . . . English language stations into a Spanish-speaking community.

Id. at 1097. See also, Cable TV Puerto Rico, 43 RR 2d 10 (1978). Using the same reasoning, the Commission should hold that the three satellite-delivered English-language affiliates of CBS, NBC and ABC carried by the Association's members are not networks but rather foreign language stations. Since these stations were carried by satellite as of the statutory date, May 1, 1991, they should qualify as "superstations" exempt from retransmission consent.

Another exception in Section 325(b) is for the retransmission of the signal of a broadcast station which is affiliated with a network directly to a home satellite antenna if the household receiving the signal is an unserved household. Certainly, the entire island of Puerto Rico is an unserved area since there are no network affiliates located there. Thus, multichannel video programming distributors could sell reception of network stations to owners of home satellite dishes without having to obtain retransmission consent. To hold that a multichannel video programming distributor via satellite need not obtain retransmission consent but that a cable system, because it utilizes a closed transmission medium to retransmit broadcast signals, does have to obtain retransmission consent is an entirely illogical result. Even if the unserved area exception in Section 325 (b) does not literally apply, this equitable disparity provides another reason for holding that the superstation exception does apply, particularly in the absence of any listed ADI for television stations serving Puerto Rico.

If, however, retransmission consent does apply to the network affiliates received by satellite in Puerto Rico, the networks should not be able to foreclose their affiliates from granting retransmission consent to Puerto Rican cable systems, particularly since no local or other off-air affiliates of CBS, NBC and ABC are otherwise available to the cable systems. The statutory language and the legislative history of the retransmission consent provisions make absolutely clear that retransmission consent was intended to give broadcasters control over their signal by distinguishing between the rights in the signal and the rights in the programming carried on that signal. This distinction is reflected in the statutory language. New subsection (b) of Section 325 clearly speaks in terms of the broadcaster's signal when it states that:

No cable system or other multichannel video programming distributor shall transmit the signal of a broadcasting station. . . . (emphasis supplied).

47 U.S.C. §325(b). In referring to a station's signal rather than its programming, Congress clearly sought to avoid an interpretation of Section 325(b) that would allow broadcast networks and program suppliers to interfere with a broadcast station's right to negotiate for cable carriage. Since there are no affiliates of CBS, NBC and ABC in Puerto Rico, the public would gain immeasurably by having the English-language programming of CBS, NBC and ABC distributed via cable television on the island.

To hold that the networks could control retransmission consent in this situation would either preclude the continued receipt by cable subscribers of this programming in Puerto Rico or result in high retransmission consent costs being paid by cable operators for programming which has already been licensed for national distribution. The Commission, at the very least, should not permit CBS, NBC or ABC to foreclose contractually the grant of retransmission consent by their affiliates to cable systems serving those areas where no local full-time service exists.

Finally, as noted above, Puerto Rico is not located in the ADI of any broadcast market. Thus, the carriage requirements for Puerto Rican television stations are uncertain. Continued access to those stations is crucial for the Association's members and their subscribers. One remedy is for the Commission to rule that all of Puerto Rico is tantamount to one ADI. Stations would then be empowered to make a must-carry/retransmission consent election, and cable systems would have the channel cap, copyright payment and signal quality conditions to invoke where applicable. At the very least, the Commission should adopt an expedited procedure to deal with ad hoc signal carriage petitions by the broadcast stations or cable operators so that continuity of carriage can be maintained.

For all of these reasons, the Association urges the Commission to find that the English-language network stations delivered to Puerto Rico via satellite are exempt from the

retransmission consent requirement or, at the very least, that the stations involved be permitted to negotiate consent with the Association's members without interference or restrictions from the networks. The Commission should also take steps to ensure the continued availability of Puerto Rican television stations to the subscribers of the Association's member systems.

Respectfully submitted,

PUERTO RICO CABLE TV ASSOCIATION

By: 

Charles S. Walsh
Stuart F. Feldstein

Fleischman and Walsh
1400 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 939-7900

Its Attorneys

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